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IN THE

Supreme Court of the United States

CURTIS A. BEASLEY,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

21 U.S.C. § 851(a) requires the government to file a notice "before trial" if it intends to seek an enhanced punishment for a drug offense based on the defendant's prior criminal conviction. In this case, the government did not provide notice "before trial," but provided it after the jury had been selected.

1. Whether the failure to provide timely notice under Section 851(a) jurisdictionally bars a court from imposing an enhanced sentence.

2. Whether notice is untimely under Section 851(a) when it is not provided until after trial has commenced but before the jury selection has been completed.

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CURTIS A. BEASLEY, PETITIONER,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtis Beasley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-12a) is published at 495 F.3d 142. The district court's judgment (Pet. App. 13a-18a), entered on August 24, 2004, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841(a) provides in relevant part: "[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense . . . a controlled substance."

21 U.S.C. § 841(b)(1)(B) provides in relevant part:

> In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance . . . which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . .

21 U.S.C. § 851(a)(1) provides: "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

STATEMENT OF THE CASE

Federal law permits the government to request the imposition of an enhanced sentence for repeat offenders in certain drug cases by providing notice of its intent to rely upon a prior conviction to the court and the defendant "before trial." 21 U.S.C. § 851(a)(1). In this case, the government failed to provide timely notice, but the petitioner did not object. The district court then applied the sentencing enhancement. On appeal, the Fourth Circuit held that the statute requiring pre-trial notice is not jurisdictional and is therefore waivable, expressly rejecting the Eleventh Circuit's contrary holding that the district court's power to impose the enhancement is conditioned on the government's timely filing of notice. The court of appeals further held that any error by the district court was not plain and therefore

was not cognizable because there was no controlling precedent in the Fourth Circuit or from this Court, even though several courts of appeals had already held that notice must be provided prior to jury selection.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute five grams or more of crack cocaine is subject to a sentence of imprisonment of between five and forty years. 21 U.S.C. § 841(a)(1)(A). Federal law also allows the government to request an enhanced sentence for repeat drug offenders. 21 U.S.C. 841(b)(1)(B). However, the government's ability to seek that enhanced sentence is expressly conditioned on its compliance with certain procedural requirements. Specifically, the base sentencing range will apply "unless *before trial*" the government "files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1) (emphasis added). When the government thus provides timely notice, the district court can impose a sentence in the significantly higher range of ten years to life imprisonment. 21 U.S.C. § 841(b)(1)(B).

2. In March 2003, petitioner Curtis Beasley was indicted on various federal drug charges. The parties selected the jury on January 6, 2004. Six days after jury selection, the government served the court and the petitioner with notice under 21 U.S.C. § 851(a)(1). The petitioner did not object to the untimely notice. The district court subsequently swore in the jury, after which the petitioner was tried and ultimately convicted.

At sentencing, the district court held that, as a consequence of the government's § 851(a)(1) submission, petitioner's applicable statutory sentencing range was enhanced to ten years to life

imprisonment. Absent the § 851 enhancement, the federal sentencing guidelines' recommended sentencing range would have been 262 to 327 months in prison. Pet. App. 4a. With the enhancement under § 841(b)(1)(B), however, the recommended sentencing range increased to 360 months to life imprisonment. The court sentenced the petitioner to 408 months of imprisonment, to be followed by eight years of supervised release. *See* Pet App. 14a.

3. Petitioner appealed the sentencing enhancement. The United States did not object to the petitioner's raising the issue for the first time on appeal; to the contrary, it specifically urged the Fourth Circuit to review the claim *de novo*. *See* U.S. C.A. Br. 12. The court of appeals held, however, that plain error review applied.

The court first held that plain error review was appropriate because, in its view, compliance with the notice requirement of § 851(a)(1) is not jurisdictional. Pet. App. 4a. The court reasoned that "when a district court imposes a sentence outside of the statutory range . . . it is not acting without power, it is exercising its power erroneously." *Id.* at 5a-6a (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). The court noted that its holding on that question was consistent with the rulings of several circuits, but was in direct conflict with the law of the Eleventh Circuit. *Id.* 7a (citing *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998)).

Applying the plain error standard, the court of appeals held that "there can be no plain error where there is no precedent from the Supreme Court or this court directly resolving" the issue. Pet. App. 10a (quotations and citations omitted). The court accordingly held that the failure to provide notice as mandated by the statute was not plain error, even though every published opinion of every court of appeals to address the question had held that §

851(a)(1) notice must be provided prior to jury selection. Pet'r C.A. Br. 13; *infra* at 11.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, as the Fourth Circuit acknowledged, its holding that § 851(a)(1) is not a limit on the district court's jurisdiction squarely conflicts with the law of the Eleventh Circuit. Second, the Fourth Circuit's holding that error cannot be "plain" if there is no on-point precedent within the circuit or from this Court conflicts with the decisions of several other courts of appeals, which have held that a uniform line of out-of-circuit authority can establish that an error is "plain." Finally, given the frequency with which sentences are enhanced in accordance with § 851, the question arises with some frequency and is important to the administration of federal criminal procedure.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONFLICT IN THE CIRCUITS CONCERNING WHETHER § 851(A)(1) IS JURISDICTIONAL AND THUS NOT SUBJECT TO FORFEITURE.

1. The courts of appeals have issued conflicting decisions concerning whether the government's compliance with 21 U.S.C. § 851(a)(1) is a jurisdictional requirement, which must be reviewed *de novo*, or whether the error is subject to forfeiture and hence subject to plain error review. The Fourth Circuit held in this case that § 851(a)(1) is not jurisdictional. *See* Pet. App. 2a. As the court of appeals noted, the First and Seventh Circuits agree. Pet. App. 7a (citing, *e.g.*, *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir. 2002); *Prou v. United States*, 199 F.3d 37, 43-46 (1st Cir. 1999)).

As the Fourth Circuit recognized, however, the Eleventh Circuit has squarely held to the contrary.

Pet. App. 7a; *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998). In *Harris*, the defendant pleaded guilty to drug charges and his sentence was enhanced even though the government did not provide timely notice under § 851(a)(1). The defendant did not object to the late notice. The Eleventh Circuit nonetheless reversed. The court explained that the "Eleventh Circuit and its predecessor court have unambiguously and repeatedly held that a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)." *Id.* at 1306 (citing *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983); *United States v. Cevallos*, 538 F.2d 1122, 1125 n.4 (5th Cir. 1976); *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974)). Quoting one of its prior decisions, the Eleventh Circuit explained that:

> An enhanced sentence is a special remedy prescribed by the Congress; prosecutorial discretion is vested in the executive branch of the government, and the district court has no authority to exercise it or pretermit it. As we have pointed out, Congress advisedly vested this discretion in the prosecutor. Unless and until prosecutorial discretion is invoked and the government files and serves an information as required by Sec. 851, the district court has no power to act with respect to an enhanced sentence; it can no more enhance the sentence than it could impose imprisonment under a statute that only prescribes a fine. Harmless error cannot give the district court authority that it does not possess.

Id. at 1306 (quoting *Olson*, 716 F.2d at 853). Accordingly, in *Harris*, the court of appeals reaffirmed its view that "Congress could not have

more clearly evinced its purpose" in authorizing enhanced sentences pursuant to § 851 only when the government seeks such enhancement by filing an information before trial or plea. *Id.* at 1307.

As the Fourth Circuit recognized, Pet. App. 7a, the conflict between its ruling and the Eleventh Circuit's holding is irreconcilable. In the Eleventh Circuit, the enhancement of petitioner's sentence would have been reversed. That court would find it determinative that the prosecution had not, through timely notice, conferred on the district court the authority to impose the enhanced sentence.

This conflict is squarely presented by this case. The issue was directly addressed below. The Fourth Circuit also observed that the question is outcome determinative, because the application of § 851 substantially enhanced petitioner's sentence. Pet. App. 4a. A ruling in petitioner's favor would have reduced the recommended guidelines range by 81 months.

2. The Fourth Circuit's decision was moreover erroneous. It is beyond question that Congress has the power to set the statutory ranges for various criminal offenses. *United States v. Booker*, 543 U.S. 220, 246 (2005); *cf. Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007). The mandatory provisions of 21 U.S.C. § 851(a)(1) demonstrate Congress's intent to exercise that authority to limit the jurisdiction of the federal courts when enhancing sentences based on prior convictions. The statute provides:

> No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a

> copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

Just last Term, this Court made clear that a party's failure to file a timely notice of appeal constitutes a jurisdictional defect. *Bowles*, 127 S. Ct. at 2364 (2007). The United States' failure to file a timely notice under § 851(a)(1) is no different. In both cases, Congress has exercised its authority to establish procedural prerequisites to the invocation of a court's powers – in *Bowles*, the court of appeals' power of review; in this case, the sentencing court's power to consider an enhanced sentence. In both cases, the required notice and its deadline perform the same important functions: when timely filed, the filing puts the opposing party on notice that a special power of the court is being invoked; and when the time for the filing has passed, the deadline provides the opposing party a right of repose that is not to be disturbed.

Strict observance of the requirements of § 851(a)(1) is also required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution—subject to procedural protections for the defendant—and not to the courts. Both the extent of the prosecutor's discretion and the strict limits on how that discretion may be exercised demonstrate Congress's intent that executive branch compliance with § 851(a)(1) be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d at 1333. In § 851, Congress struck a balance between the authority of prosecutors to seek enhanced sentences—sentences that can dramatically increase a defendant's punishment--and the need to provide fair notice and procedural protections to defendants who suddenly find themselves facing a significantly increased sentence. When courts fail to enforce the procedural protections and limitations that Congress prescribed,

courts displace the careful balance that Congress struck and, in effect, permit a sentence to be imposed in a manner that Congress forbade. Indeed, courts have relied on the fact that § 851 provides only a narrow window in which the government may seek an enhancement to demonstrate that the delegation of legislative authority to the executive branch is constitutional. *Cespedes*, 151 F.3d at 1333; *see also United States v. Jensen*, 425 F.3d 698 (9th Cir. 2005). If the power to seek an enhancement is constitutionally delegated to the executive branch only because there are strict conditions, courts ignore Congress's intent to comply with our system of separated powers when they exercise jurisdiction to enhance sentences when the prosecutor has failed to comply with the commands of the statute. Unless the prosecutor files an information before trial providing notice of its intent to seek an enhanced sentence, a court lacks jurisdiction to enhance the sentence.

This Court has held that the decision to provide notice under § 851(a)(1) is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d at 1333. A court has no greater jurisdiction to enter an enhanced sentence without a proper information from the prosecution than it would hold to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a § 851(a)(1) notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198 (9th Cir. 2004).

The court of appeals erred in concluding that its contrary holding was compelled by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998), and *Jones v. United States*, 527 U.S. 373, 386-

88 (1999). In *Steel Co.*, this Court held that a substantive legal question going to the merits of a cause of action—whether the Emergency Planning and Community Right-To-Know Act of 1986 permits citizen suits for purely past violations—was not jurisdictional and did not need to be addressed before the issue of standing: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." 523 U.S. at 89. That holding has no bearing on the proper construction of § 851. This case concerns the compliance with procedural requirements that Congress statutorily commanded to be fulfilled before a prosecutor can seek, and a court can impose, an enhanced sentence.

The court of appeals' reliance on *Jones v. United States* (Pet. App. 6a), fares no better. In *Jones*, the defendant was convicted of capital murder for a killing committed in the course of a kidnapping. 527 U.S. at 387-388. He objected to the jury instructions and decision forms. *Id.* Jones argued that, although he had failed to raise those objections before the jury retired, the Federal Death Penalty Act created an exception to plain error review for such claims. *Id.* This Court rejected that argument, in large part because the Act contained a provision that explicitly required defendants to preserve allegations of errors in accordance with the rules of criminal procedure. *Id.* at 389. § 851, by contrast, lacks any such limitation. Beyond that, § 851(a)(1)'s requirements are preconditions to the prosecutor's power to charge and the court's power to sentence; they are not routine rules of trial procedure.

II. THE FOURTH CIRCUIT'S HOLDING THAT A UNIFORM LINE OF AUTHORITY FROM OTHER CIRCUITS CANNOT RENDER AN ERROR "PLAIN" CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

Having ruled, in conflict with the Eleventh Circuit, that the government's failure to comply with § 851(a)(1) was subject to plain error review, the Fourth Circuit proceeded to create a second circuit split on the application of the plain error doctrine. That ruling, which is also incorrect, warrants review by this Court as well.

1. As a judge of the Fourth Circuit previously recognized, "[e]very court of appeals to have addressed [the issue] in a published opinion has concluded that before trial [in § 851] means before jury selection begins (which is obviously also before the jury is sworn)." *United States v. Jones*, 78 Fed. App'x 844, 856 (4th Cir. 2003) (Michael, J., dissenting).[1] In *United States v. Johnson*, 944 F.2d 396 (1991), the Eighth Circuit held that "before trial" means "before jury selection," *id.* at 407. The court explained that reading "before trial" to mean what it says "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Id.* Furthermore, enforcing § 851(a)(1) according to its terms would not overly burden the government because § 851(a)(1) allows the government to seek a

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[1] The only contrary appellate authority of which petitioner is aware is the unpublished decision in *United States v. Galloway*, No. 94-3173, 1995 WL 329242, at *8 (6th Cir. May 31, 1995).

postponement of a trial if it encounters difficulty discovering a defendant's prior convictions. *Id.*

The First, Second, Seventh, and Tenth Circuits have likewise held that, unless the government files the required information with the court prior to the commencement of jury selection, the information is untimely, such that the district court lacks the power to enhance the defendant's sentence pursuant to § 851. *See Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999); *Kelly v. United States*, 29 F.3d 1107, 1110 (7th Cir. 1994); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir. 1994); *United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992). Additionally, the Eleventh and D.C. Circuits have held an information timely filed where the government provided notice of its intention to file the information "prior to selection of the jury." *See United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990); *United States v. Brown*, 921 F.2d 1304, 1309 (D.C. Cir. 1990).

2. The Fourth Circuit failed to consider whether this uniform line of authority had any bearing on whether the trial error was "plain." Pet. App. 7a-10a. Adopting the position of the Eleventh Circuit, the court of appeals held that, if the statutory language is arguably ambiguous, there can be no plain error unless there is controlling in-circuit or Supreme Court precedent directly resolving the question in the defendant's favor. Pet. App. 9a (citing *United States v. Lejarde-Rada*, 319 F.3d 1288 (11th Cir. 2003)). "Because there is no controlling precedent—either in the Supreme Court or in our court—on the issue of when a trial begins for purposes of defining 'before trial' in § 851(a)," the court held, "we cannot say that it was error for the district court to assume that a § 851 information filed after the jury was selected but before it was sworn was timely filed." *Id.*

The Eleventh Circuit has held the same. *See Lejarde-Rada*, 319 F.3d at 1291 (11th Cir. 2003) (holding that, where the explicit language of a statute or rule does not specifically resolve an issue, "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"); *United States v. Magluta*, 198 F.3d 1265, 1280 (11th Cir. 1999) ("[A] district court's error is not 'plain' or 'obvious' if there is no precedent directly resolving an issue.").

Although consistent with the law of the Eleventh Circuit, the Fourth Circuit's construction of the plain error rule conflicts with the decisions of several other circuits that rely on out-of-circuit authority to find an error "plain." In *United States v. Gore*, for example, the Second Circuit held that:

> [t]he lack of this Court's precedent directly on point . . . will not prevent the district court's error from being deemed 'plain' because this is not a case in which we have taken no position on a certain issue and upon which no other circuit has spoken, or upon which there is a sharp dispute among the other circuits.

154 F.3d 34, 43 (2d Cir. 1998). The court then found plain error in the district court's application of a federal drug trafficking provision. The court explained that, even though "[t]his Court . . . has not yet addressed directly the application of Double Jeopardy . . . [to] § 841(a)(1) . . . other circuits have uniformly decided" that in § 841 Congress did not intend for multiple punishments to be based on a single quantity of drugs, and that analogous cases from this Court and the Second Circuit supported that conclusion. *Id.* Consequently, the court held that "the rules laid out in [this Court's previous cases], the uniform holdings of our sister circuits, and our own line of cases are relevant precedents with a sufficient level of specific applicability to the facts of

this case so that the district court's error was clear and obvious under the law at the time of [the defendant's] trial." *Id.* at 47.

Since *Gore*, the Second Circuit has reiterated the importance of looking at cases from other circuits when performing plain error review. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) ("It may be appropriate for this Circuit to find an error plain, even in the absence of binding precedent from the Supreme Court or this Circuit, where other circuits have uniformly taken a position on an issue that has never been squarely presented to this Court."); *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003) ("We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking.").

Five other courts of appeals have likewise looked to precedent from their sister circuits to justify a finding of plain error, even where the specific error at issue had not been addressed previously by the reviewing court. For example, in *United States v. Hardwell*, the Tenth Circuit held that it was sufficient to render an error "plain" that precedent from other circuits supported the defendant's claim on appeal. 80 F.3d 1471, 1484 (10th Cir. 1996). "Although neither the Supreme Court nor this court has decided this issue," the court wrote, "given the weight of authority from other circuits, we conclude that the error was sufficiently clear and obvious to be plain error . . . ." *Id.*

The First, Fifth, Seventh, and Ninth Circuits have reached the same conclusion. *See United States v. Munoz-Franco*, 487 F.3d 25, 56 (1st Cir. 2007) (holding that, "consistent with recent circuit court decisions" in four other circuits, the district court plainly erred); *United States v. Chea*, 231 F.3d 531, 537 (9th Cir. 2000) (finding plain error, and noting that "[w]hile we have not previously considered

whether [this error] is plain error, other circuits have, and have concluded that it is"); *United States v. Leonard*, 157 F.3d 343, 345-46 (5th Cir. 1998) (acknowledging that a claim was "*res nova* in this Circuit," but finding plain error anyway where four other circuits recognized the alleged error); *United States v. Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) (holding that "[i]n light of [our previous cases,] as well as the fact that each of the other circuits has determined that [the district court's action is erroneous], we are of the opinion that it was plain error").

3. The Fourth Circuit's plain error standard is not only contrary to the majority rule in the circuits, but is also wrong. Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, the threshold inquiry under Rule 52(b) is whether "the error is clear under current law," not whether there happens to be binding precedent within a particular geographic jurisdiction. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

There is no basis for the Fourth Circuit's view that "current law" means only the law of the court of appeals or this Court. As this Court observed in *United States v. Frady*, Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly addressed." 456 U.S. 152, 163 (1982). Based on those two competing interests, this Court said that the Rule was "intended to afford a means for the prompt redress of miscarriages of justice." *Id.* When, as here, the error can be discerned from a straightforward reading of the statutory text and has been consistently construed by numerous courts of appeals, then the error can be "clear under current law" even before this Court speaks or the particular circuit in which the

defendant is convicted happens to confront the question. Moreover, if the Fourth Circuit had believed that the uniform authority of the other circuits was incorrect, it could have denied relief on that ground. Accordingly, the principal effect of the stringent rule of the Fourth and Eleventh Circuits is to deny relief when there is unquestionable error, but the issue simply has not yet arisen in those particular circuits. Denying relief in such circumstances does nothing to promote the balance of interests sought by Rule 52(b). The miscarriage of justice suffered by petitioner in this case would have been addressed had he found himself in any one of the six circuits to have confronted the question presented here. Unless there is substantial reason to believe that those circuits have misunderstood the law, justice is not served by denying relief based on an accident of geography or timing.

Moreover, the logic of the Fourth and Eleventh Circuit's rule predictably denies relief when relief is most warranted. One might reasonably expect that the most obvious and plain errors will arise the least frequently. Yet, unless the same error has previously arisen in that circuit, the Fourth and Eleventh Circuits would hold that the error is not "plain." Such a result not only leads to an "obvious injustice," *Frady*, 456 U.S. at 163, but is in conflict with this Court's teachings in the related area of qualified immunity from civil liability, in which the Court has made clear that the absence of directly on-point, controlling precedent does not mean that law is not "clearly established." *See Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (holding that "a consensus of cases of persuasive authority" would be sufficient to clearly establish a legal rule).

Directing the lower courts to consider out-of-circuit precedent also will aid the district courts that will inevitably decide *res nova* claims in the future, reduce the incidents of plain error, and avert

unnecessary litigation. In *Frady*, this Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely [objection]." 456 U.S. at 163. Had the district court surveyed the law of the circuits on the meaning of "before trial" in § 851(a)(1) at the time of the petitioner's sentencing, and had the Fourth Circuit looked beyond its own cases at the time of the appeal, they would have found that every court of appeals to publish an opinion has determined that trial begins at jury selection. Consequently, the district court's error was sufficiently clear to fall within the meaning of "plain error" under Rule 52(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4107

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

CURTIS A. BEASLEY a/k/a Pooh,
DEFENDANT-APPELLANT.

Argued March 16, 2007.
Decided July 25, 2007.

Appeal from the United States District Court
for the District of South Carolina, at Greenville.
Henry M. Herlong, Jr., District Judge.
(CR-02-1358)

ARGUED: Fletcher N. Smith, Jr., Greenville, South Carolina, for Appellant. Regan Alexandra Pendleton, Assistant United States Attorney, Office of the United States Attorney, Greenville, South Carolina, for Appellee. ON BRIEF: Reginald I. Lloyd, United States Attorney, Columbia, South Carolina, for Appellee.

Before: NIEMEYER, MICHAEL, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge MICHAEL and Judge GREGORY joined.

OPINION

NIEMEYER, Circuit Judge:

A jury convicted Curtis Beasley of conspiracy

to distribute at least 5 grams, but less than 50 grams, of crack cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1)(B), and possession of 5 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(b)(1)(B). Based on the fact that Beasley had twice before been convicted of felony drug offenses, the district court sentenced him to 408 months' imprisonment on each count, to run concurrently. *See* 21 U.S.C. § 841(b)(1)(B); U.S.S.G. § 4B1.1.

On appeal, Beasley contends for the first time that the district court was not authorized to rely on the enhanced penalties provided by § 841(b)(1)(B) for repeat drug offenders because the government did not file an "information" "before trial," as required by 21 U.S.C. § 851(a), and therefore did not provide him with timely notice of its intent to rely on his prior convictions to request increased punishment. The government filed a § 851 information one week after the jury had been selected but two weeks before the jury was sworn and opening statements were made. Beasley contends that because "before trial" requires the filing to be made before *jury selection begins,* the government did not comply with the procedural requirements of § 851, and therefore his sentence could not be increased based on his prior felony drug convictions. He argues that the § 851 process is not only a condition precedent to an increased punishment but also jurisdictional, entitling him to raise the issue for the first time on appeal.

We conclude that 21 U.S.C. § 851 is not jurisdictional and therefore is subject to the usual rules of procedural default. Because Beasley failed to object to the § 851 information below, he forfeited his claim, and we therefore conduct our review under the plain error standard of Federal Rules of Criminal Procedure 52(b). As Beasley failed to satisfy the criteria for noticing plain error, we reject Beasley's challenge based on an untimely filing of the § 851 information. We also reject Beasley's two challenges

to the district court's evidentiary rulings. Accordingly, we affirm.

I

Beasley's convictions for violating § 841(b)(1)(B) subjected him to an increased statutory penalty because he had a "prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(B). Without a prior conviction, Beasley faced a sentence of 5 to 40 years' imprisonment; with a prior conviction, however, he faced a sentence of 10 years' to life imprisonment, so long as the government elected to pursue the increased punishment by filing a § 851 information.

On January 12, 2004, more than two weeks before the jury was sworn and opening statements were made, the government filed and served a § 851 information indicating that it intended to rely on Beasley's two prior felony drug convictions to seek an enhanced sentence under § 841(b)(1)(B). By then, however, the jury had already been selected. Under the practice that the district court employed, the jury was selected on January 6, 2004, three weeks before swearing the jury and beginning with opening statements.

After receiving the § 851 information, Beasley filed several pre-trial motions, including a motion to dismiss, a motion to suppress, and a motion in limine, but he did not file any paper contesting the substance contained in the § 851 information or the information's timeliness.

After conviction and during sentencing, the district court assumed that the § 851 information had been timely filed, and, based on Beasley's prior felony drug convictions, enhanced Beasley's sentence. Thus, Beasley was subject to a maximum of life imprisonment under § 841(b)(1)(B), and his offense level, as determined by U.S.S.G. § 4B1.1, was 37,

yielding a recommended sentencing range of 360 months' to life imprisonment. The district court sentenced Beasley to 408 months' imprisonment and, as mandated by § 841(b)(1)(B), to 8 years of supervised release. In the absence of an increased statutory sentence, the Sentencing Guidelines would have recommended a sentence in the range of 262 to 327 months' imprisonment and 5 years' supervised release.

On appeal, Beasley contends for the first time that the § 851 information was filed untimely because it was not filed before the jury was selected. He also challenges two evidentiary rulings made by the district court at trial.

II

Beasley's challenge to the timeliness of the government's § 851 filing is raised for the first time here on appeal, and therefore we would ordinarily review the issue for plain error, unless § 851 were jurisdictional. If the procedural requirements of § 851 were jurisdictional, Beasley's challenge could be raised for the first time on appeal because any jurisdictional defect would "require correction regardless of whether the error was raised in the district court." *United States v. Cotton,* 535 U.S. 625, 630 (2002).

Beasley appears to be arguing that the requirements of § 851 were indeed jurisdictional, relying on *Harris v. United States,* 149 F.3d 1304, 1307 (11th Cir.1998). Accordingly, we address first the question of whether § 851 requirements are jurisdictional.

Subject matter jurisdiction concerns a court's very power to hear a case, and because "a court's power to hear a case can never be forfeited or waived," the lack of subject matter jurisdiction can be raised at any time. *Cotton,* 535 U.S. at 630. "Without jurisdiction the court cannot proceed at all in any

cause [except to] announc[e] the fact and dismiss[ ] the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). If the requirements of § 851 were jurisdictional for purposes of increasing punishment under 21 U.S.C. § 841(b)(1)(B), under Beasley's argument we could not review the merits of whether punishment may be enhanced but could only dismiss the increased sentence.

Section 851(a) reads in pertinent part:

> No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1). On its face, this language does not confer jurisdiction or limit it, nor does it make the court's jurisdiction conditional. Rather, it imposes a condition on "*increased punishment* by reason of one or more prior convictions." *Id.* (emphasis added). Regardless of whether the condition is met, a district court derives its jurisdiction to determine the issue of increased punishment from 18 U.S.C. § 3231, which provides that the federal district courts "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." It follows that "this jurisdiction necessarily includes the imposition of criminal penalties." *Prou v. United States*, 199 F.3d 37, 45 (1st Cir.1999).

Thus, when a district court imposes a sentence for a federal offense outside of the statutory range or when it ignores statutory mandates for sentencing,

such as are contained in 18 U.S.C. § 3553(a), it is not acting without power; it is exercising its power erroneously, which is subject to correction on review by appellate courts. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 90 (1998) (differentiating between a court's power to hear a case-its subject matter jurisdiction-and its power to issue a remedy). In *Steel Co.*, the federal statute specified the limits of the district court's powers to grant relief, with Congress even using the word "jurisdiction" to describe those limits. *See Steel Co.*, 523 U.S. at 90. But the Supreme Court held that such rules of law "specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil [or criminal] penalties," do not affect the court's jurisdiction. *Id.* (emphasis in original); *cf. Jones v. United States,* 527 U.S. 373, 386-88 (1999) (holding that the extra procedural safeguards found in the Federal Death Penalty Act for capital cases are subject to plain-error review). Thus, once a court has subject matter jurisdiction over a case it does not lose that jurisdiction by exceeding the court's remedial authority.

Section 851 simply specifies "remedial powers" of the court, regulating the level of a sentence that may be imposed in a federal criminal case, over which the district court otherwise has subject matter jurisdiction pursuant to 18 U.S.C. § 3231, and the district court is not stripped of jurisdiction when the government fails to comply with the provision's procedural requirements. Moreover, the requirements of § 851 can be waived by defendants, unlike genuine jurisdictional limits. While § 851 uses mandatory language, so do numerous other statutory and constitutional guarantees that are waivable. *See United States v. Mezzanatto,* 513 U.S. 196, 201-03 (1995) (listing examples). "A defendant who may waive indictment, despite the fifth amendment's unqualified language," may also "waive the filing of an information [under § 851] listing prior convictions." *United States v. Lawuary,* 211 F.3d 372,

379 (7th Cir.2000) (Easterbrook, J., concurring).

We conclude that the government's alleged failure to comply with the procedural requirements of § 851(a) renders erroneous a court's reliance on § 841(b)(1)(B) to enhance a sentence for repeat drug offenders, nothing more. *See United States v. LaBonte*, 520 U.S. 751, 754 n. 1 (1997). As such, a defendant's failure to object at trial to the untimeliness of the government's § 851(a) information constitutes a procedural default, permitting courts of appeal to review the issue only for plain error. In so concluding, we join several other circuits. *See, e.g., United States v. Flowers*, 441 F.3d 900, 903 (10th Cir.2006); *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir.2002); *United States v. Mooring*, 287 F.3d 725, 727 (8th Cir.2002); *Prou*, 199 F.3d at 43-46; *United States v. Vanness*, 85 F.3d 661, 663 n. 2 (D.C.Cir.1996). *But see Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir.1998); *United States v. Hill*, 142 F.3d 305, 312 (6th Cir.1998).

III

Plain error review of Beasley's sentence is conducted pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, which provides that "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Before an appellate court can notice and correct an error not raised at trial, the defendant must show that there is "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)) (quotation marks and other citations omitted); *see also Cotton*, 535 U.S. at 631-32.

In this case, Beasley contends that the district court erred in imposing increased punishment based on an untimely filed § 851 information. He argues that when § 851(a) provides that the information must be filed "before trial," it requires that the information be filed before jury selection begins, which occurred in this case on January 6, 2004. The government argues that "before trial" means before the jury was sworn, which was on January 28, 2004. In this case, because of the practice followed by the district court, the jury was selected three weeks before it was sworn, and the government filed the § 851 information one week after jury selection and two weeks before the jury was sworn. Applying the criteria of Rule 52(b), we address whether the timing of the government's filing was plain error.

The operative language of § 851(a) directs that no person "shall be sentenced to increased punishment by reason of one or more prior convictions, unless *before trial*...the United States attorney files an information," identifying the convictions to be relied on. (Emphasis added). The primary purpose of this provision is to give the defendant notice of the government's intention to seek an enhanced sentence based on the defendant's prior convictions, giving the defendant an opportunity to challenge the use of the prior convictions and to prevent sentencing errors. *See United States v. Campbell,* 980 F.2d 245, 252 (4th Cir.1992) ("The purpose of the section 851 information is to give the person convicted and about to be sentenced as a second offender an opportunity to show that he is not the person previously convicted") (citation and quotation marks omitted). Another purpose is to provide the repeat drug offender with full knowledge before trial of the consequences of a guilty verdict, thereby enabling him to make informed decisions regarding the entry of a plea or the planning of trial strategy.

In this case, the government filed the § 851

information two weeks *before* the jury was sworn but *after* the jury had been selected. While Beasley filed three pretrial motions during the two weeks following his receipt of the § 851 information and before the jury was sworn, he did not file a motion challenging the § 851 information. Of course, he need not have filed such a motion if he had concluded that the government's § 851 information was filed "before trial."

The term "before trial" is surely ambiguous. We have observed that the beginning of trial may be defined differently in different contexts:

> As a general matter, it cannot be disputed that a "trial" is the judicial proceeding during which the law and the facts are examined to determine the issues between the parties. Accordingly, the beginning of this proceeding must be the first meaningful act in actually conducting the proceeding. And depending on the issue for determining what the first meaningful act is, the beginning of trial may be when the court calls the proceeding to order; or when the court calls the proceeding to order and all of the actors are present in the courtroom, including the jury venire; or when the process for the selection of jury begins; or when the jury is impaneled; or when the opening statements are made; or when the first witness is called.

DeLoach v. Lorillard Tobacco Co., 391 F.3d 551, 563 (4th Cir.2004).

Because there is no controlling precedent-either in the Supreme Court or in our court-on the issue of when a trial begins for purposes of defining "before trial" in § 851(a), we cannot say that it was error for the district court to assume that a § 851

information filed after the jury was selected but before it was sworn was timely filed. *See United States v. Lejarde-Rada,* 319 F.3d 1288, 1291 (11th Cir.2003) ("[W]here the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"). Furthermore, for an error to be "plain," the error must be plain "under current law." *Olano,* 507 U.S. at 734. There was no controlling "current law" in this circuit on the meaning of "before trial" when Beasley was sentenced, nor is there any today. *See Johnson,* 520 U.S. at 468 (holding that "it is enough that an error be 'plain' at the time of appellate consideration"). Accordingly, the district court's assumption that the government filed its § 851 information "before trial" was not plain error, and therefore we will not take notice of it.

IV

Somewhat distinct from his § 851 argument, Beasley also contends that the district court violated his Sixth Amendment jury trial right when the court found the fact of his previous felony drug convictions, but this contention is directly foreclosed by *Almendarez-Torres v. United States,* 523 U.S. 224, 226 (1998). *See United States v. Booker,* 543 U.S. 220, 244 (2005); *United States v. Cheek,* 415 F.3d 349, 352-53 (4th Cir.2005).

Accordingly, we affirm Beasley's sentence.

V

Beasley also challenges two of the district court's evidentiary rulings, and we reject both challenges.

He contends first that the district court abused its discretion in allowing the government's expert witness, Investigator Lyle Kirian of the Greenville

County, South Carolina Vice and Narcotics Agency, to testify as an expert witness about the process of converting powder cocaine into crack cocaine without first testing the reliability of his testimony by conducting a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Supreme Court has stated that "the law grants a district court the same broad latitude when it decides how to determine [the] reliability [of expert testimony] as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 142 (1999) (emphasis in original). Therefore the standard of review is for abuse of discretion. *See United States v. Grimmond*, 137 F.3d 823, 831 (4th Cir.1998) ("A district court's evidentiary rulings are reviewed under the narrow abuse of discretion standard"). Recognizing the broad latitude given to trial courts, we conclude that the district court did not abuse its discretion by not conducting a *Daubert* hearing in this case. Kirian's credentials, which were substantial, included: training in numerous law enforcement courses on the identification of narcotics, including identifying clandestine drug-making labs; participation as a member of a local narcotics agency in the seizure of cocaine in its various stages on its way to becoming crack cocaine; and witnessing on video the full process of turning powder cocaine into crack cocaine. This training and experience amply qualified Kirian to give testimony on the process of making crack cocaine from cocaine powder. Accordingly, the district court did not abuse its discretion in allowing him to testify as an expert, without conducting a *Daubert* hearing.

Finally, Beasley contends that the district court abused its discretion in denying his request for a contemporaneous limiting instruction under Federal Rule of Evidence 105 to instruct the jury when evidence was admissible against one party, but not another. Rule 105 provides that "the court, upon request, shall restrict the evidence to its proper scope

and instruct the jury accordingly," and we have held that the timing of such an instruction is left to the discretion of the trial court. *See Klein v. Sears, Roebuck & Co.*, 773 F.2d 1421, 1426 (4th Cir.1985) ("The more modern approach is to defer to the trial court's discretion as to the timing of the limiting instruction even in criminal trials"). In this case, the district court met its obligation under Rule 105 when it instructed the jury at the conclusion of the trial that it "is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants."

* * *

For the reasons given, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA,

V.

CURTIS A BEASLEY a/k/a Pooh

JUDGMENT IN A CRIMINAL CASE
(For Offense Committed On or After November 1, 1987)

Case Number: 6;02CR1358-3
US Marshal's Number: 91015-071

Fletcher N. Smith Jr. Retained
(Defendant's Attorney)

THE DEFENDANT: Was found guilty on counts 1g and 13g of the superseding indictment on February 3, 2004 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(a)(1)	Please See Indictment	3/12/03	1g
21 U.S.C. § 841(a)(1) § 841(b)(1)(B)	Please See Indictment	10/31/02	13g

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count 1 of the original indictment is dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitutions, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court or United States attorney of any material change in the defendant's economic circumstances.

August 23, 2004

Henry M. Herlong, Jr., U. S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred eight (408) months. This term shall consist of 408 months on each of counts 1g and 13g, to be served concurrently.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

—

Defendant delivered on 10-25-04 to XCI – Edgefield at Edgefield, SC, with a certified copy of this judgment.

John J LaManna
Warden

By R. Paul
LIE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight (8) years. This term shall consist of 8 years on count 1g and 5 years on count 13g, to be served concurrently.

1. The defendant shall participate in a program of testing and treatment for substance abuse as directed by the United States Probation Officer until released from the program by the officer.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994: The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments act set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with any additional conditions to the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$___	$_____

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community

restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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No. 07-548

In the Supreme Court of the United States

CURTIS A. BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Counsel of Record
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QUESTION PRESENTED

Whether the government's filing of an information identifying petitioner's prior convictions under 21 U.S.C. 851(a)(1) before the jury was sworn, but after voir dire began, was neither jurisdictional error nor reversible plain error.

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In the Supreme Court of the United States

No. 07-548

CURTIS A. BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 495 F.3d 142. The judgment of the district court (Pet. App. 13a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2007. The petition for a writ of certiorari was filed on October 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of one count of conspiracy to distribute at least five grams but less than 50 grams of crack cocaine, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1); and

one count of possession of five grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(B). He was sentenced to concurrent terms of imprisonment for 408 months, to be followed by eight years of supervised release. The court of appeals affirmed.

1. Under 21 U.S.C. 851(a)(1), no person convicted of an offense under the federal drug statutes shall be sentenced to a statutorily enhanced punishment based on his prior convictions "unless before trial, or before entry of a plea of guilty," the United States Attorney files an information "stating in writing the previous convictions to be relied upon." If the United States Attorney cannot obtain the facts about the prior convictions with due diligence before trial or before entry of the plea, the district court may postpone the trial or the taking of the plea "for a reasonable period for the purpose of obtaining such facts." *Ibid.*

If an information is filed under Section 851(a)(1), the district court, after trial but before sentencing, will inquire whether the defendant admits or denies the prior convictions, and will inform the defendant that "any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." 21 U.S.C. 851(b).

Section 851(c) provides that if the defendant denies the allegations of a prior conviction, the district court shall hold a hearing on the issue. Section 851(c)(2) provides that any challenge to a prior conviction that is not raised before sentence is imposed "shall be waived unless good cause be shown for failure to make a timely challenge." Section 851(e) bars a defendant from challenging the validity of any prior conviction that occurred more than five years before the date of the information.

2. Petitioner and Charles Mattison were crack cocaine dealers in South Carolina. In the early 2000s, law enforcement agents investigated and then arrested both men. Petitioner and Mattison then confessed that they were crack dealers. See Gov't C.A. Br. 3-4.

On January 12, 2004—one week after the jury had been selected, but two weeks before the jury was sworn and opening statements were made—the government filed an information setting forth petitioner's prior convictions for felony drug convictions that would enhance the minimum and maximum statutory penalties under Section 841(b)(1)(B). Pet. App. 3a. Petitioner's prior convictions included a 1994 conviction for possession with intent to distribute crack cocaine and a 1995 conviction for conspiracy to possess with intent to distribute crack cocaine.[1] Petitioner did not object in the district court to the timeliness of that information. *Id.* at 2a-3a.

After the jury found petitioner guilty, the Presentence Report (PSR) stated that he was subject to a statutory range of ten years to life imprisonment and a minimum term of eight years of supervised release on the drug conspiracy conviction under Sections 841(b)(1)(B) and 851, and to a statutory range of five to 40 years imprisonment and a minimum of four years of supervised release on the substantive drug conviction under Section 841(b)(1)(B). C.A. App. 1048-1049.

The PSR also determined that petitioner was a career offender under United States Sentencing Guidelines § 4B1.1 (U.S.S.G.) based on his prior convictions,

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[1] The Section 851(a)(1) information stated that petitioner was convicted on both offenses on April 3, 1996. 02-CR-1358 Docket entry No. 286 (D.S.C. Jan. 12, 2004). The Presentence Report stated that the first conviction was for a state offense whereas the second conviction was for a federal offense. C.A. App. 1042-1043.

which resulted in a total offense level of 37 and a criminal history category of VI, yielding a Guidelines sentencing range of 360 months to life imprisonment. C.A. App. 1042-1045.

At sentencing, petitioner did not challenge the validity of his 1994 and 1995 convictions for purposes of the statutory enhancement—presumably because Section 851(e) barred any challenge to the validity of convictions more than five years old. Petitioner objected to the PSR's designation of him as a career offender on the ground that using his prior convictions violated his right to a jury decision on drug quantity under *Blakely* v. *Washington*, 542 U.S. 296 (2004). The district court overruled the objection, adopted the PSR's findings and Guideline computations, and sentenced petitioner to 408 months of imprisonment, to be followed by eight years of supervised release. C.A. App. 916-924.

Anticipating this Court's later decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the district court stated on the record that, "[i]f the guidelines were not applicable, * * * an appropriate sentence would have been 38 years" (*i.e.*, four years longer than the actual sentence). C.A. App. 924.

3. On appeal, petitioner claimed for the first time that his enhanced sentence was illegal because the government failed to file the Section 851(a)(1) information "before trial." He maintained that the untimely filing was a jurisdictional defect that excused his failure to object to the timeliness of the filing at trial. The court of appeals rejected his contention, holding that Section 851 does not implicate a district court's jurisdiction. The court therefore reviewed petitioner's claim only for plain error under Federal Rule of Criminal Procedure 52(b)

and found that the asserted error was not "plain." Pet. App. 1a-12a.

The court of appeals explained that jurisdiction refers to a court's power to try a case. Pet. App. 4a. A district court is granted jurisdiction over criminal offenses, the court noted, by 18 U.S.C. 3231, and that jurisdiction necessarily includes the power to impose criminal penalties for an offense. If a district court imposes a penalty outside a statutory range or ignores a statutory mandate, the court concluded, it is not acting without power; it is simply exercising its power erroneously. Pet. App. 5a-6a (relying on *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998)). While the court acknowledged the existence of contrary authority, it joined the majority of circuits that have held that Section 851 is not jurisdictional. *Id.* at 7a.

The court then reviewed petitioner's forfeited claim for plain error. It recognized that under Rule 52(b), a defendant must show that there was an "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Pet. App. 7a (quoting, among others, *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals noted that petitioner had argued that the statutory phrase "before trial" means before jury selection begins, while the government had argued that the phrase means before the jury is sworn. Pet. App. 8a. In the court's view, "[t]he term 'before trial' is surely ambiguous." Pet. App. 9a. The court took note of its recognition in an earlier case that the beginning of a trial may be defined differently in different

contexts. *Ibid.* (discussing *DeLoach* v. *Lorillard Tobacco Co.*, 391 F.3d 551, 563 (4th Cir. 2004)). The court of appeals then concluded that, because

> there is no controlling precedent—either in the Supreme Court or in our court—on the issue of when a trial begins for purposes of defining "before trial" in § 851(a)(1), we cannot say that it was error for the district court to assume that a § 851 information filed after the jury was selected but before it was sworn was timely filed.

Id. at 9a-10a (relying on *United States* v. *Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003), which held that, "where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"). Because it determined that the district court's assumption that the government had filed its Section 851 information "before trial" was not a "plain" error, the court of appeals did not take notice of it. Pet. App. 10a.[2]

ARGUMENT

1. Petitioner contends (Pet. 5-10) that, when an information identifying prior convictions that support an enhanced sentence is not timely filed under 21 U.S.C. 851(a)(1), the untimely filing is a jurisdictional defect that bars a court from imposing an enhanced sentence and requires reversal of the enhanced sentence even if a defendant does not object at trial. Only one court of appeals has accepted that contention, and its reasoning

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[2] The court of appeals also rejected petitioner's Sixth Amendment challenge to his sentence and his objections to two evidentiary rulings. Pet. App. 10a-12a. The petition does not renew those claims.

is seriously undermined by later decisions of this Court. The majority of the courts to address the issue have correctly held that the timing requirements of Section 851 are not jurisdictional. This Court's intervention is not warranted at present. In any event, this case is not an appropriate vehicle to address the question.

a. At the outset, both petitioner and the court of appeals appear to have assumed that petitioner's sentence can only be supported by an enhancement under 21 U.S.C. 841(b)(1)(B) and 851. As the government noted in its brief in the court of appeals, however, that assumption is mistaken. See Gov't C.A. Br. at 12 (calling petitioner's Section 851 argument "without merit because the district court clearly based its sentence on career criminal status rather than § 851 enhancement"); *id.* at 20 ("Even if the Court determines that the Notice was not filed in a timely manner in this case, [petitioner] suffered no harm as his sentence was based on his career offender status not on the § 851 enhancement."). At sentencing, the district court expressly referred to petitioner's "career offender status" as "a result of his prior convictions." C.A. App. 915. It also adopted the guidelines calculations in the PSR, including a total offense level of 37 and criminal history level of VI. *Id.* at 920-921. In the PSR, each of those numbers was a direct consequence of petitioner's status as a career offender under Sentencing Guidelines § 4B1.1. C.A. App. 1042, 1045.[3]

Based on his conspiracy and substantive drug convictions involving five grams of crack cocaine under Section 841(b)(1)(B)(iii), petitioner faced a statutory prison term

[3] As noted above, the PSR also stated the mandatory minimum and maximum sentences under Sections 841(b)(1)(B) and 851. C.A. App. 1048-1049.

of five to 40 years and a minimum of four years of supervised release on each count. As a result of Section 851 and his prior conviction, the statutory range for petitioner's potential sentence would have been enhanced to ten years to life imprisonment and to a minimum of eight years of supervised release. 21 U.S.C. 841(b)(1)(B). The sentence that petitioner received as a career offender under the Guidelines—408 months of imprisonment (*i.e.*, 34 years) and eight years of supervised release—was well within the *unenhanced* statutory range of five to 40 years and four-years-to-life term of supervised release under Section 841(b)(1)(B). When a defendant is sentenced as a career offender under Sentencing Guidelines § 4B1.1 and the sentence falls within the unenhanced statutory range, the government does not have to file a Section 851(a)(1) information at all.[4] See, *e.g.*, *United States* v. *Ramirez*, 454 F.3d 380, 381-382 (2d Cir.), cert. denied, 127 S. Ct. 526 (2006); *United States* v. *Frisby*, 258 F.3d 46, 51 (1st Cir. 2001); *Damerville* v. *United States*, 197 F.3d 287, 289-290 (7th Cir. 1999), cert. denied, 529 U.S. 1136 (2000).

Thus, the government did not have to file a Section 851(a)(1) information in this case, much less a timely one, to support the sentence that petitioner challenges.

b. Even assuming that Section 851 is necessary to petitioner's sentence, the Fourth Circuit's holding that Section 851 is not a jurisdictional statute is correct. This

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[4] The potential sentence enhancement under 21 U.S.C. 841(b)(1)(B) and 851 is not co-extensive with the career-offender guideline, U.S.S.G. § 4B1.1. Section 841(b)(1)(B) enhances a defendant's sentence based on "a prior conviction" for a "felony drug offense," but a career-offender designation under Sentencing Guidelines § 4B1.1(a) requires two prior felony convictions that can be for either a "crime of violence" or a "controlled substance offense."

Court has repeatedly stated that "jurisdiction" refers to a court's power to act, and not every error in exercising judicial authority is a jurisdictional one.

In *United States* v. *Cotton*, 535 U.S. 625 (2002), the Court held that an indictment that omitted a specification of drug quantity that served to enhance the defendant's sentence was not a jurisdictional error. The Court stated that the term "jurisdiction" refers to a court's statutory or constitutional power to adjudicate a case, which can never be forfeited or waived. *Id.* at 630. Emphasizing that the right to indictment by a grand jury can be waived, the Court held that a defective indictment did not deprive a court of jurisdiction to impose an enhanced sentence. *Id.* at 630-631.

In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), the Court held that a time limitation in Federal Rule of Bankruptcy Procedure 4004(a) was not a jurisdictional rule. *Kontrick* emphasized that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. at 455. Later, in *Eberhart* v. *United States*, 546 U.S. 12 (2005), the Court, relying in part on *Kontrick*, held that the time limits for filing a motion for a new trial in Federal Rule of Criminal Procedure 33 are non-jurisdictional claim-processing rules. *Id.* at 15-20.

In light of those cases, the "before trial" requirement in Section 851(a)(1) is not a "jurisdictional" one. The jurisdiction of district courts for criminal cases is set forth in 18 U.S.C. 3231. Once a district court has acquired such jurisdiction, neither that statute nor any

other purports to divest it of jurisdiction simply because of a statutory or rule violation in adjudicating the case.

The purposes of Section 851 underscore that it is not a jurisdictional requirement. The primary purpose of Section 851 is to provide reasonable notice to the defendant of a recidivist enhancement and an opportunity to be heard, including the right to challenge a prior conviction that may be used to enhance his sentence. *United States* v. *Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007); *United States* v. *Jackson*, 121 F.3d 316, 319 (7th Cir. 1997). Section 851 "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Prou* v. *United States*, 199 F.3d 37, 44 (1st Cir. 1999) (quoting *United States* v. *Johnson*, 944 F.2d 396, 407 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992)). Those interests protect a defendant's individual rights; they do not serve to limit the class of cases over which a court has cognizance. And in this case, nothing suggests that the filing of the information two weeks before the jury was sworn deprived petitioner of the time he needed to determine whether to go to trial, to plan his trial strategy, or to challenge the specified prior convictions.

Section 851(a)(1)'s "before trial" requirement uses a mandatory term ("shall"), but that does not make the statute a jurisdictional one. Even an "inflexible claim-processing rule" that must be enforced upon timely objection is not thereby transformed into "a rule governing subject-matter jurisdiction." *Kontrick*, 540 U.S. at 456; see *Eberhart*, 546 U.S. at 19 ("These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if a party forfeits

them."). Furthermore, Section 851 does not prevent a defendant from waiving his right to challenge the timeliness of the government's Section 851(a)(1) information. The default rule is that a defendant can waive most statutory or regulatory provisions. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110 (2000) (Interstate Agreement on Detainers statute); *United States* v. *Mezzanatto*, 513 U.S. 196 (1996) (plea bargaining statements under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410). And, as *Cotton* indicates, when a right is waivable, an error is unlikely to be jurisdictional. 535 U.S. at 630-631.

Petitioner's reliance (Pet. 7-9) on *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), is misplaced. In *Bowles*, the Court held that a party's filing of a notice of appeal outside the 30-day time limit of Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. 2107(a) was a jurisdictional defect. Petitioner argues that *Bowles* controls this case because Section 851(a)(1) is a statute instead of a rule of procedure, but that position overlooks that a district court already has jurisdiction over a criminal proceeding by virtue of 18 U.S.C. 3231. That jurisdiction entails the power to determine sentences under 18 U.S.C. 3551 and 3553. Petitioner claims (Pet. 8) that Section 851's provision establishing "the sentencing court's power to consider an enhanced sentence" is comparable to the provision in *Bowles* that established "the court of appeals' power of review." But, unlike a notice of appeal in a civil case, Section 851 does not bring a case before a court.[5] Section 851 is more akin to the statutory limitation at issue in *Scarborough* v. *Principi*,

[5] For the same reason, petitioner's analogy (Pet. 9) between a Section 851 information and a decision to charge a case fails. Both involve prosecutorial discretion, but while an initial charge may be necessary to invoke a court's jurisdiction, a Section 851 notice is not.

541 U.S. 401 (2004), in which the Court invoked *Kontrick* and held that the time limit for filing an application for attorney's fees in an already-pending case was "not properly typed 'jurisdictional.'" *Id.* at 414. *Bowles* distinguished *Scarborough* as "concern[ing] 'a mode of relief . . . ancillary to the judgment of a court' that already had plenary jurisdiction." 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 413). The same is true here for the district court that already had jurisdiction over the criminal case against petitioner.[6]

Because an untimely Section 851(a)(1) information is not properly considered a "jurisdictional" defect, the court of appeals correctly reviewed petitioner's unpreserved claim only for plain error. Cf. *Cotton*, 535 U.S. at 631-632 (applying plain error review to non-jurisdictional error in indictment).

c. Most of the courts of appeals have rejected petitioner's argument (Pet. 7-10) that the timely filing of a Section 851 information is a jurisdictional requirement, either squarely holding or otherwise stating that Section 851(a)(1) sets forth non-jurisdictional procedural requirements for an enhanced sentence. See *Pritchett*, 496 F.3d at 541-547 (6th Cir.); *United States* v. *Flowers*, 464 F.3d 1127, 1129-1130 (10th Cir. 2006); *Sapia* v. *United States*, 433 F.3d 212, 216-217 (2d Cir. 2005); *United States* v. *Ceballos*, 302 F.3d 679, 690-692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137,

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[6] The jurisdictional provision at issue in *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (Jan. 8, 2008), is also markedly different from Section 851, because it governs the initiation of a claim in the Court of Federal Claims (rather than an ancillary matter such as attorney's fees or a potential sentence enhancement) and also serves "a broader system-related goal" of "limiting the scope of a governmental waiver of sovereign immunity." Slip op. 2-3.

538 U.S. 926, and 538 U.S. 939 (2003); *United States* v. *Dodson*, 288 F.3d 153, 160-161 (5th Cir.), cert. denied, 537 U.S. 888 (2002); *United States* v. *Mooring*, 287 F.3d 725, 727-728 (8th Cir.), cert. denied, 537 U.S. 864 (2002); *Prou*, 199 F.3d at 45-46 (1st Cir.); *United States* v. *Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996); see also *United States* v. *Severino*, 316 F.3d 939, 943 (9th Cir.) (en banc) (characterizing Section 851 as a "procedural" statute), cert. denied, 540 U.S. 827 (2003). As petitioner concedes (Pet. 5-7), only the Eleventh Circuit has held that the failure to meet the procedural requirements of Section 851(a)(1) is jurisdictional error. *Harris* v. *United States*, 149 F.3d 1304 (11th Cir. 1998).

Notwithstanding that difference among the circuits, review is unwarranted at this time. Since 2000, the clear trend in the circuits is to hold that Section 851(a)(1) is not a jurisdictional statute. Some of the cases—including the Sixth Circuit's decision in *Pritchett*, which postdates the decision at issue here—have relied on this Court's recent statements that "jurisdiction" ordinarily refers only to a court's subject-matter jurisdiction or to personal jurisdiction. See *Pritchett*, 496 F.3d at 542-547 (discussing *Eberhart* and *Kontrick* and other court of appeals cases that have relied on them). By contrast, the Eleventh Circuit's 1998 decision in *Harris* predates not only *United States* v. *Cotton*, *supra*, and other decisions from this Court restricting the definition of "jurisdiction" but also the decisions from other courts of appeals that have taken cases like *Eberhart* and *Kontrick* into account in holding that Section 851's timeliness requirement is not a jurisdictional one. Accordingly, the Eleventh Circuit should be given an opportunity to re-

consider its ruling in *Harris* before this Court grants review on this issue.[7]

2. Petitioner contends (Pet. 11-17) that the court of appeals misapplied the plain-error test, because its conclusion that any error was not plain was apparently based on the lack of controlling Supreme Court or circuit precedent on the issue. He argues that the court of appeals "create[d]" a circuit split, Pet. 11, and erred by failing to consider out-of-circuit authority holding that, in order to be filed "before trial," a Section 851(a)(1) information must be filed before voir dire begins. Several reasons, however, counsel against further review by this Court: although there is no firm rule about when out-of-circuit authority must control the outcome of an inquiry into plain error, the Fourth Circuit has repeatedly recognized the potential value of out-of-circuit authority in evaluating how "plain" an alleged error is; petitioner overstates the supposed uniformity of the out-of-circuit authority about Section 851; and, even assuming any error here was plain, petitioner cannot establish the other predicates of the plain-error test.

a. For an error to be plain, it must be "clear" or "obvious" under current law. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Out-of-circuit authority can be relevant to that inquiry, but it is neither necessary nor always sufficient. An error is usually not plain when the courts of appeals are split on the issue. See, *e.g.*, *United States* v. *Smith*, 402 F.3d 1303, 1323 (11th Cir.), vacated on other grounds, 545 U.S. 1125 (2005); *United States* v. *Diaz*, 285 F.3d 92, 96 (1st Cir. 2002). A court of appeals

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[7] The Eleventh Circuit has restated in *dicta* that a Section 851(a)(1) error is jurisdictional, see *United States* v. *Ramirez*, 501 F.3d 1237, 1239 (2007), but it did not reverse the sentence on jurisdictional grounds.

may conclude that an error is plain on the basis of within-circuit authority. See *United States* v. *Alferahin*, 433 F.3d 1148, 1157 (9th Cir. 2006). An error in failing to follow a legal norm may even be plain in some cases where there has been *no* prior judicial construction of the statute or rule in question. See *United States* v. *Joaquin*, 326 F.3d 1287, 1293 (D.C. Cir. 2003).

Nevertheless, no rule requires a court of appeals to hold that an error is "plain" simply because other courts of appeals have found a particular procedure to be erroneous.[8] If the Fourth Circuit had to find that the filing of a Section 851(a)(1) information after voir dire was a "plain" error based solely on the prior existence of out-of-circuit authority, that would effectively bar the Fourth Circuit from making its own evaluation of the

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[8] The cases cited by petitioner (Pet. 13-15) relied on out-of-circuit authority to hold that an error was "plain," but they did not hold that a court of appeals *must* find that an error is "plain" based on out-of-circuit authority. Many of the decisions petitioner cites relied on out-of-circuit authority *along with* other factors. See *United States* v. *Gore*, 154 F.3d 34, 47 (2d Cir. 1998) (out-of-circuit authority, and analogous Supreme Court and within circuit authority); *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) (same); *United States* v. *Munoz-Franco*, 487 F.3d 25, 55-56 (1st Cir. 2007) (out-of-circuit authority and government concession), cert. denied, 128 S. Ct. 678, 127 S. Ct. 679, and 128 S. Ct. 682 (2007); *United States* v. *Leonard*, 157 F.3d 343, 345-346 (5th Cir. 1998) (out-of-circuit authority and the court's own determination that the Sentencing Guidelines clearly required the result that favored the defendant); *United States* v. *Hardwell*, 80 F.3d 1471, 1483-1484 (10th Cir. 1996) (out-of-circuit authority that followed the reasoning of a Supreme Court decision). In *United States* v. *Chea*, 231 F.3d 531 (9th Cir. 2000), the Ninth Circuit relied on out-of-circuit authority to find that a Sentencing Guidelines error was "plain" but it did not hold that a court *must* find that an error is "plain" based on out-of-circuit authority.

issue in a subsequent case in which the issue is directly presented to it.[9]

In any event, petitioner's contention (Pet. 12-13) that the Fourth Circuit's decision reflects a determination not to consider out-of-circuit authority is refuted by repeated statements from the Fourth Circuit that out-of-circuit authority may be relevant in determining whether an error is plain. See *United States* v. *Ellis*, 326 F.3d 593, 596-597 ("An error is clear or obvious 'when the settled law of the Supreme Court or this circuit establishes that an error has occurred. In the absence of such authority, decisions by other circuit courts of appeals are pertinent to the question of whether an error is plain.'"), cert. denied, 540 U.S. 907 (2003) (quoting *United States* v. *Neal*, 101 F.3d 993, 998 (4th Cir. 1996)). To the extent that the Fourth Circuit's failure to address any out-of-circuit authority in this case implies that it follows a different rule from the one in *Ellis* and *Neal*, that court should be left to resolve that internal dispute in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. Even if the Fourth Circuit was under an obligation to look at out-of-circuit precedent, petitioner overstates the supposed uniformity of that precedent. It is not altogether clear whether the term "before trial" in

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[9] Petitioner suggests (Pet. 16) that, if the Fourth Circuit disagreed with the other circuits, it should simply have held that the government's Section 851(a)(1) information was in fact timely. But that is inconsistent with the premises of plain-error review, which do not require the court to decide the threshold question of error. See *Olano*, 507 U.S. at 737 ("assum[ing] without deciding" that "there was indeed an 'error,'" but finding no effect on substantial rights). The entire point of the "obviousness" requirement is to protect a district court from reversal when its failure to raise an issue on its own motion was not unreasonable in light of existing law.

Section 851(a)(1) means "before voir dire begins" (as petitioner contends) or at some other time (such as before the jury is sworn). Five courts of appeals have stated that it means before voir dire or jury selection. *Prou*, 199 F.3d at 48 (1st Cir.); *United States* v. *White*, 980 F.2d 836, 842 (2d Cir. 1992); *United States* v. *McAllister*, 29 F.3d 1180, 1183 (7th Cir. 1994); *United States* v. *Johnson*, 944 F.2d at 407 (8th Cir.); *United States* v. *Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir.), cert. denied, 511 U.S. 1095 (1994). The issue in the Eleventh Circuit, however, is unclear. In *United States* v. *Rice*, 43 F.3d 601 (1995), the Eleventh Circuit held that a Section 851(a)(1) information was timely filed "[o]n the day [the defendant's] trial began, but before the jury was empaneled," which may have been after voir dire had begun. *Id.* at 603-604. Moreover, when the District of Columbia Circuit held that a pre-voir-dire filing was timely under Section 851(a)(1), it expressly declined to decide when a trial begins under Section 851, thus leaving open the possibility that the information in a case like this one could be timely. *United States* v. *Brown*, 921 F.2d 1304, 1308-1309 n.6 (1990).[10]

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[10] Before this case, the Fourth Circuit had not decided the issue either. In *United States* v. *Jones*, 78 Fed. Appx. 844 (2003), cert. denied, 540 U.S. 1137 (2004), the Fourth Circuit affirmed a conviction that raised the issue without a majority opinion. One judge found it unnecessary to decide the issue. *Id.* at 848 (opinion of Williams, J.). Another judge, rejecting the majority rule, concluded that a Section 851(a)(1) information is timely if it is filed (as it was in this case) before the jury is sworn. *Id.* at 852 & n.3 (opinion of Shedd, J.). A third judge would have followed the majority rule pressed by petitioner here. *Id.* at 856-857 (Michael, J., dissenting). Judge Michael was also on the panel in this case and evidently did not believe that the out-of-circuit authority made the alleged error obvious.

Moreover, as petitioner concedes (Pet. 11 n.1), the Sixth Circuit has held that a Section 851(a)(1) information was timely because it was filed before the jury was sworn. *United States* v. *Galloway*, No. 94-3173, 1995 WL 329242, at *8 (May 31, 1995). Although *Galloway* was an unpublished decision, the Sixth Circuit currently permits parties to cite unpublished opinions. See Sixth Cir. R. 28(g) ("[c]itation of unpublished opinions is permitted"); see also Fed. R. App. P. 32.1 advisory committee note (2006) ("The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits."). Accordingly, the Sixth Circuit could well follow *Galloway* in a published decision in the future.

The court of appeals correctly held that there was no plain error in the pre-jury-swearing filing of the Section 851(a)(1) information given the absence of precedent from this Court or the Fourth Circuit, as well as the Fourth Circuit's previous observation that the term "before trial" is "surely ambiguous," since it means different things in different contexts. Pet. App. 9a-10a. Cf. *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) (holding that jeopardy does not attach until the jury is sworn). That the court of appeals did not rely on the out-of-circuit authority was immaterial because the out-of-circuit authority is not uniform and there is thus no reason to believe it would have changed the Fourth Circuit's conclusion.

c. Even if the district court plainly erred in treating an information that was filed two weeks before the jury was sworn as "before trial," petitioner could not meet the other prongs of the plain-error test, which require him to show not only that the error affected substantial rights, *United States* v. *Dominguez-Benitez*, 542 U.S.

74, 83 (2004), but also that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (internal quotation marks omitted; brackets in original).

The substantial-rights inquiry of the plain-error test requires a defendant to show a reasonable probability that the result of the trial (or sentencing proceeding) would have been different without the error. *Dominguez-Benitez*, 542 U.S. at 82. Yet, as explained above (at 7-8, *supra*), petitioner could not have been prejudiced because his sentence was enhanced under Sentencing Guidelines § 4B1.1 and did not exceed the *unenhanced* statutory maximums under Sections 841(b)(1)(B) and 851. Moreover, reversal of petitioner's sentence now would not be likely to lead to a shorter sentence on remand because the district court indicated that it would have imposed a *longer* term of imprisonment if the Guidelines did not apply. C.A. App. 924.

Similarly, the "public reputation of judicial proceedings" would not be impaired by allowing petitioner's sentence to stand. In *Cotton*, the Court held that the erroneous omission of drug quantity from an indictment that enhanced a defendant's sentence under Section 841(b) did not implicate the "public reputation of judicial proceedings" prong where the evidence of drug quantity was "overwhelming" and "essentially uncontroverted" at trial. 535 U.S. at 633. *Cotton* emphasized that, in providing for graduated penalties for drug trafficking in Section 841(b), Congress intended for dealers in large quantities in drugs to be sentenced to more severe terms than those dealers involved in lesser quantities. Therefore, the real threat to the "public reputation of judicial proceedings" would be to impose lesser sentences on

large-scale drug dealers because of errors that were forfeited at trial. *Id.* at 633-634; see also *Johnson*, 520 U.S. at 470.

That rationale also applies here. Congress provided for enhanced sentences for drug recidivists. Congress also barred defendants from challenging the validity of prior convictions that are more than five years old under Section 851(e). Because petitioner's prior convictions are essentially undisputed—and because the district court indicated that petitioner actually deserved a *longer* sentence than the one he received under the then-mandatory Guidelines—sentencing him as the recidivist that he is did not adversely affect the "public reputation of judicial proceedings."[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2008

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[12] Petitioner contends (Pet. 16) that the court of appeals' alleged error results in an injustice based "on an accident of geography or timing." But the plain-error test already contemplates the possibility of such disparate outcomes, because it unquestionably will result in the denial of relief whenever there is a split in the circuits that prevents an error from being considered plain in the first place in circuits that have not addressed the issue.

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IN THE

Supreme Court of the United States

CURTIS A. BEASLEY,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER

Every court of appeals to consider the question has held that 21 U.S.C. § 851(a) forbids the imposition of an enhanced sentence unless prosecutors provide notice to the defendant before jury selection. The United States, moreover, does not dispute the correctness of that rule. Here, the district court violated the statute, but the Fourth Circuit refused to correct the error. That ruling is the subject of two conflicts in the circuits. First, the court of appeals' decision is in acknowledged conflict with the Eleventh Circuit concerning whether a violation of Section 851(a) is jurisdictional and non-waivable. Second, given the uniform line of out-of-circuit authority, other courts of appeals would reject the Fourth Circuit's holding that the error could not be "plain." Because the case presents an ideal vehicle to resolve both conflicts and the government's arguments against review fail, certiorari should be granted.

1. There is no dispute that the government violated Section 851(a) by failing to give petitioner notice of the sentencing enhancement prior to jury selection. But the court of appeals refused to correct the error on the ground that it was waived. In so holding, the court acknowledged that its decision squarely conflicted with the law in the Eleventh Circuit. Pet. App. 4a.

The United States acknowledges the split, but contends that it is possible that the Eleventh Circuit will reverse course. BIO 13. Perhaps – but only if the Eleventh Circuit were to overthrow more than a decade of consistent precedent. "The Eleventh Circuit and its predecessor court have *unambiguously* and

repeatedly held that a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)." *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998) (emphases added; citing additional cases).

The government suggests that the Eleventh Circuit could reverse course based on general jurisdictional rulings by this Court. But none of those decisions involves Section 851(a) or even a closely analogous statute. More importantly, the Eleventh Circuit recently reconfirmed its rule that the application of Section 851(a) is jurisdictional and non-waivable, notwithstanding this Court's "general" jurisdictional rulings in other areas. BIO 14 n.7; *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007).

The government's assertion that the issue was not presented in *Ramirez* is mistaken. In *Ramirez*, the Eleventh Circuit specifically "construe[d] the notice requirement of 21 U.S.C. § 851(a)(1)." 501 F.3d at 1238. The government had provided an untimely notice under Section 851(a), *see* 501 F.3d at 1239 n.3, and the defendant raised no objection. The district court nonetheless held that the violation "deprived it of jurisdiction to impose the enhanced sentence," and the Eleventh Circuit unqualifiedly agreed. *Id.* at 1239-40. "We have held that the notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose

the enhanced sentence." *Id.* at 1239 (citing Eleventh Circuit cases).[1]

Ramirez hardly stands alone. In *United States v. Thompson*, 473 F.3d 1137 (2007), the Eleventh Circuit reconfirmed that Section 851(a) is jurisdictional and non-waivable. "The requirements of § 851 are not precatory; they must be followed in order for the § 841 enhancements to be applied." 473 F.3d at 1144. The court squarely held that a late-filed notice "has no effect" and noted that, under that circuit's precedent, "the government does not suggest otherwise." *Id.* at 1145.

2. Certiorari should also be granted because this case squarely presents a second circuit conflict, with still greater significance for the administration of federal criminal law, concerning whether a uniform line of out-of-circuit authority may itself render an error "plain."

The government suggests that the Court should not resolve that plain-error question because the law concerning the untimeliness of notice under Section 851 is not uniform in other circuits. That is wrong. Five circuits have held, and two circuits have strongly suggested, that notice is untimely under Section 851(a) if not provided prior to jury selection. *See* Pet. 11-12. Moreover, neither the Fourth Circuit in its opinion nor the government in its brief questions the correctness of that rule. There is no con-

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[1] The court of appeals went on to address the proper application of Section 851(a) despite the defendant's waiver, and it upheld the sentence only because the government had previously filed another, timely notice under another case number before re-indicting the defendant. *Ramirez*, 501 F.3d at 1240.

trary precedent in other circuits. The government notes that the Sixth Circuit's rules would permit parties to cite to its unpublished decision in *United States v. Galloway*, No. 94-3173, 1995 WL 329242 (6th Cir. May 31, 1995). True enough, but the fact that an unpublished decision may be *cited* (as may, for example, a district court decision), does not make it *precedential* and thus *Galloway* does nothing to disrupt the actual uniformity of circuit *law*. *E.g.*, *Michael v. Ghee*, 498 F.3d 372, 382 n.6 (6th Cir. 2007) ("unpublished decisions are not precedentially binding under the doctrine of *stare decisis*").

The further proposition that "the Sixth Circuit could well follow *Galloway* in a published decision in the future" (BIO 18) is not only exceedingly unlikely, given the uniformly contrary decisions of other circuits, but is also irrelevant because the question presented here is whether the district court's error was plain given the state of circuit law *as it stands now*. The government also says that the Section 851(a) information "may have been [filed] after voir dire had begun" in *United States v. Rice*, 43 F.3d 601, 603-04 (11th Cir. 1995). BIO 17. But the opinion contains no such suggestion and, in any event, the question was not presented in that case. *See also United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990) (notice timely when provided prior to jury selection).

Notwithstanding that the district court's decision departed from uniform circuit court precedent, the Fourth Circuit held that the error *could not* be plain. Pet. App. 10a. As the petition demonstrated, other courts of appeals have held the opposite, a fact that

the government does not dispute. Pet. 13-15. The question, moreover, is important and could recur with respect to myriad federal criminal law issues.

The government now maintains that a court of appeals may, but need not always, deem an error plain on the basis of out-of-circuit authority. BIO 14. The government also does not dispute that other courts of appeals have repeatedly held that out-of-circuit decisions establish plain error. *See* Pet. 13-15. But the government never comes to grips with the fact that the law in the Eleventh and now Fourth Circuits is directly to the contrary. Those courts hold that, if any ambiguity in the legal question can be identified, "there *can be no plain error* where there is no precedent from the Supreme Court or this court directly resolving" the issue. Pet. App. 10a (emphasis added). *See also* Pet. 13 (citing Eleventh Circuit authority).

The government's suggestion that this is just an intra-circuit conflict overlooks the Eleventh Circuit's holding that uniform out-of-circuit authority cannot establish plain error. Pet. App. 9a (citing *United States v. Lejarde-Rada*, 319 F.3d 1288 (11th Cir. 2003). And this case is an appropriate vehicle to resolve that conflict.

The government also errs in arguing that the Fourth Circuit would find plain error based solely on other circuits' decisions. It is undisputed that the Fourth Circuit has never done so. The Fourth Circuit's decision in *United States v. Ellis*, 326 F.3d 593 (4th Cir. 2003), *cert. denied*, 540 U.S. 907 (2003), simply acknowledged in *dictum* that other courts' decisions might sometimes be "pertinent." *Id.* at 597. Likewise, *United States v. Neal*, 101 F.3d 993, 998

(4th Cir. 1996), uttered the same *dictum* and, even then, only when this Court's precedent dictated the result. Thus, at best, the Fourth Circuit is willing to consider out-of-circuit authority only when its own precedent and that of this Court already support the defendant, but do not definitively "settle[]" the outcome. *Neal*, 101 F.3d at 998.

Finally, the government's argument that petitioner cannot establish the remaining plain-error requirements is wrong. The district court's failure to require a timely notice under Section 851(a) subjected petitioner to a significantly higher sentence. Not surprisingly, no court has endorsed the government's extraordinary contention that its own violations of the law can be ignored because Congress intended drug dealers to serve long sentences and, thus, the failure to provide notice will never "adversely affect the public perception of judicial proceedings." BIO 20.

That argument also wrongly assumes that Congress adopted a categorical notice requirement for no reason. In fact, timely notice serves two distinct purposes. First, "it allows the defendant to contest the accuracy of the information." It also affords the defendant "ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Ramirez*, 501 F.3d at 1239. The failure to provide the required notice thus directly implicates the "integrity" as well as the "fairness" of the proceedings. *Johnson v. United States*, 520 U.S. 461, 470 (1997).

3. Finally, the government's assertion that, because petitioner's sentence rests on the career offender Sentencing Guideline, the question presented makes no difference in this case, is not only wrong, but also rests critically on a reading of the Guideline that has been rejected by this Court and numerous circuits. Because the government misunderstood the clear meaning of the sentencing guidelines, we treat the issue at length.

The career offender guideline (§ 4B1.1) provides that a covered defendant's "criminal history category * * * shall be Category VI" and "the table in this section" shall provide the defense level (unless a higher offense level otherwise applies). U.S.S.G. 4B1.1(b). The table, in turn, determines the offense level according to the defendant's "Offense Statutory Maximum." The Guideline's Application Note defines the "Offense Statutory Maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a * * * controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision." As relevant here, if the maximum is life imprisonment, the offense level is 37; if the maximum is between twenty-five years and life, the offense level is 34.

The government's argument seems to assume that the "Offense Statutory Maximum" is the highest sentence hypothetically applicable to a case, without regard to whether the government complies with the procedural requirements of Section 851(a). That is not correct, and the government notably cites no authority for its contrary position. In a case (such as this one) in which the defendant's sentence can be

enhanced only if the government complies with the procedures dictated by Section 851(a), the government's failure properly to file the required notice precludes application of the higher offense level.

The Solicitor General's position, in fact, is in the teeth of *United States v. Labonte*, 520 U.S. 751 (1997), which held that a predecessor application note to the career offender guideline – providing that the Offense Statutory Maximum is set by the maximum *unenhanced* sentence – was contrary to the directive of 28 U.S.C. § 994(h) to enact a guideline providing for a sentence "at or near the maximum term authorized." This Court held that the "maximum" must be determined by the sentence applicable after enhancements, including (*if* the government complies with Section 851(a)) the enhancement authorized by that statute: "Thus, for defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. *For defendants who did not receive the notice, the unenhanced maximum applies.*" *Labonte* at 759-60 (emphasis added). See also *id.* at 761-62 (rejecting argument that allowing the guideline to be determined by the filing of the Section 851(a) notice leaves too much power in the hands of prosecutors on the ground that "[s]uch discretion is an integral feature of the criminal justice system").

In the wake of *Labonte*'s controlling construction of the governing statute, the courts of appeals have consistently held that the applicable offense level under Section 4B1.1 depends on whether the government properly provides the required notice:

> The offense level of 37 results from a combination of the career offender guideline, which assigns level 37 when the maximum statutory sentence is life, *id.* § 4B1.1, and the relevant statute, 21 U.S.C. § 841(b)(1)(B), which authorizes a maximum sentence of life for anyone who distributes five grams or more cocaine base and who has a prior felony drug conviction. *The defendant correctly points out that the statutory life sentence applies only if, before trial, the government files "an information with the court * * * stating in writing the previous convictions to be relied upon." Id. § 851(a)(1).*

In re Sealed Case, 488 F.3d 1011, 1017 n.3 (D.C. Cir. 2007) (emphasis added). *See also, e.g., United States v. Gibson*, 434 F.3d 1234, 1241, 1252 (11th Cir. 2006), *cert. denied*, 126 S. Ct. 2911 (2006); *United States v. MacKinnon*, 401 F.3d 8, 9 (1st Cir. 2005); *United States v. Rogers*, 228 F.3d 1318, 1321 (11th Cir. 2000); *United States v. Cruz*, 156 F.3d 22, 30 (1st Cir. 1998), *cert. denied*, 526 U.S. 1124 (1999). Notably, the Fourth Circuit has reversed a sentence on precisely that basis. *United States v. Windley*, 2000 U.S. App. LEXIS 15440, No. 99-4574 (4th Cir. June 30, 2000).

The government relies on *United States v. Frisby*, 258 F.3d 46 (1st Cir. 2001), for the proposition that, "[w]hen a defendant is sentenced as a career offender under Sentencing Guidelines § 4B1.1 and the sentence falls within the unenhanced statutory range, the government does not have to file a Section 851(a)(1) information at all." BIO 8. That is a correct

and unexceptional statement *if* the statutory maximum triggered by the Section 851(a) notice has not been used to raise the defendant's offense level under the guideline. But *Frisby* is quite clear that when the guideline offense level *does* depend on the enhancement authorized under Section 851(a), the higher offense level does not apply if notice is not properly provided. See 258 F.3d at 51 ("If the government had filed a § 851 information, Frisby's maximum prison term under 21 U.S.C. § 841 would have risen from 20 to 30 years. *See* 21 U.S.C. § 841(b)(1)(C). Based on this enhanced statutory maximum, Frisby's career offender base offense level would have risen from 32 to 34.").

In this case, because the government did not comply with Section 851(a) – a point it does not deny – petitioner's correct offense level under the guideline was not 37 (the level applicable to an enhanced maximum term of life imprisonment), but instead was 34 (the level applicable to the unenhanced maximum term of forty years). Contrary to the government's argument (BIO 7), the Fourth Circuit did not "assume[]" that result. The issue received considerable attention at oral argument. And then, in its opinion, the Fourth Circuit specifically recognized that the application of the guideline itself turned on the validity of the Section 851(a) notice:

> After conviction and during sentencing, the district court assumed that the § 851 information had been timely filed, and, based on Beasley's prior felony convictions, enhanced Beasley's sentence. *Thus*, Beasley was subject to a maximum of life imprisonment under §

> 851(b)(1)(B), *and* his offense level as determined by U.S.S.G. § 4B1.1, was 37, yielding a recommended sentencing range of 360 months' to life imprisonment. The district court sentenced Beasley to 408 months' imprisonment and, as mandated by § 841(b)(1)(B), to 8 years of supervised release. *In the absence of an increased sentence*, the Sentencing Guidelines would have recommended a sentence in the range of 262 to 327 months' imprisonment and 5 years' supervised release.

Pet. App. 4a (emphases added).[2] Accordingly, this case presents an appropriate vehicle to decide the questions presented.

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[2] The government notes in passing that the district court indicated (albeit without any explanation or elaboration) that it would have imposed a still higher sentence if not bound by the guideline range. See BIO 4. But when it said that, the district court was operating under the doubly erroneous view that (i) petitioner's criminal history category was 37 rather than 34, which is a very significant difference in sentencing terms, and that (ii) petitioner was subject to a statutory term of life imprisonment. There is no reason to assume that the court would have adhered to that view if the error were corrected. If the district court believed that a sentence on the higher end of the range was appropriate (as suggested by the comment cited by the government), then it is critical that the district court misunderstood what the range was, given this Court's directive that a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, No. 06-7949, slip op. 6 (Dec. 10, 2007).

CONCLUSION

For the foregoing reasons and those set out in the Petition for a Writ of Certiorari, certiorari should be granted.

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